

SERVICE DATE - NOVEMBER 23, 2016

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 493X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—  
IN COOK COUNTY, ILL.

Decided: November 22, 2016

By decision served on August 19, 2016, the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF Railway Company (BNSF) of an approximately 0.89-mile rail line on BNSF's Lumber District Lead beginning just west of Laflin Street at Engineering Station 118+00 and proceeding east along West Cermak Road to the most easterly point at Engineering Station 157+65 and heading north along the Sangamon Street Lead at Engineering Station 163+50, including both legs of the wye, in Chicago, Cook County, Ill. (the Line).<sup>1</sup> Notice of the exemption was served and published in the Federal Register on May 23, 2016 (81 Fed. Reg. 32,381). The exemption became effective on September 18, 2016.

On September 26, 2016, the City of Chicago, acting by and through its Department of Transportation (the City), late-filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with BNSF for acquisition of the Line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29.<sup>2</sup> Pursuant to 49 C.F.R. § 1152.29, the City has also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on September 28, 2016, BNSF notified the

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<sup>1</sup> The Board's authorization was subject to employee protective conditions and three environmental conditions. One environmental condition, requiring consultation with the U.S. Fish and Wildlife Service (USFWS) regarding potential impacts to any federally listed, endangered, threatened, or candidate species that may occur in the vicinity of the right-of-way, was removed by a decision served on November 1, 2016. The other two environmental conditions remain in effect.

<sup>2</sup> Requests for interim trail use/rail banking were to be filed by June 10, 2016. See BNSF Ry. Co.—Aban. Exemption—in Cook Cty., Ill., AB 6 (Sub-No. 493X), (STB served May 23, 2016). However, in Abandonment & Discontinuance of Rail Lines & Transportation Under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting requests after the due date when good cause is shown. Because there is no indication that the City late-filed request will prejudice any party, it will be accepted.

Board that it had not consummated the abandonment of the Line and does not object to the requested issuance of a NITU.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, BNSF may fully abandon the Line, subject to any outstanding conditions. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The City also filed late a request for imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that BNSF be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The City's justification for its request is that this corridor has considerable value for recreational trail purposes and that the 180-day period is needed to assemble and review title information, appraisal and environmental information, and begin negotiations with BNSF.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from September 18, 2016, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on March 17, 2017, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until May 22, 2017. If a trail use agreement is reached for a portion of the right-of-way prior to May 22, 2017, BNSF must keep

the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The City's late-filed requests for a NITU under 16 U.S.C. 1247(d) and a public use condition are accepted and granted.
3. Upon reconsideration, the August 19, 2016 decision exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with BNSF for trail use for the rail line, for a period of 180 days from the service date of this decision and notice, until May 22, 2017, and to permit public use negotiations as set forth below, for a period of 180 days commencing from the effective date of the exemption, until March 17, 2017.
4. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, BNSF may discontinue service. BNSF shall keep intact the right-of-way, including potential trail-related structures such as bridges, trestles, culverts, and tunnels, for a period of 180 days from the effective date of the exemption, until March 17, 2017, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.
5. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

6. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 5 above.

7. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

8. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by May 22, 2017, for the right-of-way, interim trail use may be implemented. If no agreement is reached, BNSF may fully abandon the Line, subject to any outstanding conditions.

10. This decision and notice is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.